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No. 05-9222

In the Supreme Court of the United States

LONNIE LEE BURTON, PETITIONER

v.

DOUG WADDINGTON, SUPERINTENDENT, STAFFORD CREEK CORRECTIONS CENTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether *Blakely* v. *Washington*, 542 U.S. 296 (2004), which held that facts, other than a prior conviction, supporting a sentence above the standard sentencing range in a legislatively prescribed sentencing guidelines system must be found by a jury and proved beyond a reasonable doubt, announced a new rule.

2. If *Blakely* announced a new rule, whether its requirement of proof beyond a reasonable doubt applies retroactively on collateral review.

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INTEREST OF THE UNITED STATES

Blakely v. *Washington*, 542 U.S. 296 (2004), held that facts, other than a prior conviction, supporting a sentence above the standard sentencing range in a legislatively prescribed sentencing guidelines system must be found be a jury and proved beyond a reasonable doubt. This case addresses whether *Blakely* is retroactive on collateral review. Although this Court extended the *Blakely* rule to the federal Sentencing Guidelines in *United States* v. *Booker*, 543 U.S. 220 (2005), the retroactivity of *Booker* presents distinct issues because of *Booker*'s remedial holding. See, *e.g.*, *McReynolds* v. *United States*, 397 F.3d 479, 481 (7th Cir.), cert. denied, 545 U.S. 1110 (2005). Nevertheless, the questions presented in this case require the Court to consider more generally the standards governing the availability of new rules on collateral review. The United States therefore has a substantial interest in this case.

STATEMENT

1. On October 18, 1991, petitioner followed a 15-year-old boy home from school. Petitioner forced his way into the boy's house at gunpoint and raped him both orally and anally. After the rape, petitioner told the boy not to move for 15 minutes or petitioner would shoot him. Petitioner then stole $160 and left the house. When the boy's father returned home, the boy was lying motionless, frightened that petitioner might still be in the house. In 1994, a jury found petitioner guilty of rape, robbery, and burglary. J.A. 23, 27, 44-45.

At that time, Washington's sentencing guidelines provided that sentences for multiple offenses "shall be served concurrently," and "[c]onsecutive sentences may only be imposed under the exceptional sentence provisions of" the Revised Code of Washington, Sections 9.94A.120 and 9.94A.390. Wash. Rev. Code § 9.94A.400.[1] Section 9.94A.120(2) stated that the "court may impose a sentence outside the standard range for [the] offense if its finds * * * that there are substantial and compelling reasons justifying an exceptional sentence." *Id.* § 9.94A.120(2). The statute provided a non-exhaustive list of "illustrative factors which the court may consider in the exercise of its discretion to impose an exceptional sentence," including that the "operation of the multiple offense policy of RCW 9.94A.400 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter." *Id.* § 9.94A.390(2)(i).

The standard sentencing ranges were 234 to 304 months for petitioner's rape conviction, 153 to 195 months for his robbery conviction, and 105 to 134 months for his burglary conviction. J.A. 26. On March 16, 1998, the trial court sentenced petitioner to 304 months for the rape, 153 months for the robbery, and 105 months for the burglary. The court ordered the

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[1] Citations to the Revised Code of Washington are to the version in existence at the time of petitioner's sentencing in 1998.

three sentences to run consecutively for a total sentence of 562 months. J.A. 9. The court relied on three factors in imposing consecutive sentences, including that petitioner's "long criminal history, combined with the 'multiple offense policy,' results in a sentence that is clearly too lenient." J.A. 29-31. The court found that each factor, "standing alone, is a substantial and compelling reason and justification for imposing an exceptional sentence." J.A. 30-31.[2]

The Washington Court of Appeals affirmed. J.A. 43-54. The appeals court held that the trial court did not err in running petitioner's sentences consecutively because "the multiple offense policy justifies the exceptional sentence." J.A. 51. The Washington Supreme Court denied review. J.A. 55.

2. In January 2002, petitioner filed a federal habeas petition claiming that his sentence violated due process because the facts supporting imposition of consecutive sentences were not submitted to a jury and proved beyond a reasonable doubt. J.A. 61. He relied on *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), which held that any fact (other than a prior conviction) that increases the penalty for a crime beyond the statutory maximum must be proved to a jury beyond a reasonable doubt, and on *Ring* v. *Arizona*, 536 U.S. 584, 609 (2002), which applied *Apprendi*'s rule to hold that an aggravating factor that is statutorily necessary for imposition of the death penalty must be found by a jury. See J.A. 75.

A magistrate judge recommended that the petition be denied. J.A. 56-76. He concluded that petitioner's sentence did not violate *Apprendi* or *Ring* because petitioner "received an aggregate 562-month sentence for all three" offenses, and his sentence for each offense did not exceed the standard sentencing range for the offense. J.A. 76. The district court

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[2] Petitioner had been sentenced in 1994 and then resentenced in 1996 after a prior conviction was reversed. The Washington Court of Appeals had reversed that sentence on grounds that are not relevant here and remanded for resentencing. J.A. 45.

adopted the magistrate judge's report and recommendation and denied the habeas petition. J.A. 77. Petitioner appealed.

While the appeal was pending, this Court decided *Blakely* v. *Washington*, 542 U.S. 296 (2004). *Blakely* extended the rule of *Apprendi* to Washington's sentencing guidelines system. The Court held unconstitutional an exceptional sentence imposed under the Washington guidelines because the facts supporting the sentence, which was above the standard sentencing range for the defendant's offense, had not been proved to a jury beyond a reasonable doubt. *Id.* at 303-305.

The court of appeals affirmed the denial of the habeas petition. J.A. 78-82. On the merits of petitioner's challenge to his exceptional sentence, the court held that he could not rely on *Blakely* because it "established a new rule that does not apply retroactively on collateral review." J.A. 81. Although petitioner could rely on *Apprendi*, which was decided before his convictions and sentence became final, the court held that there was no *Apprendi* violation because "the sentence on any individual count, and the total sentence imposed does not exceed the statutory maximum." *Ibid.*

SUMMARY OF ARGUMENT

Under *Teague* v. *Lane*, 489 U.S. 288, 311 (1989) (plurality opinion), new constitutional rules of criminal procedure do not apply retroactively on collateral review unless they are "watershed" rules. Because *Blakely* v. *Washington*, 542 U.S. 296 (2004), announced a new rule of procedure that is not a "watershed" rule, it does not apply retroactively.

A. A rule is "new" unless it was so dictated by precedent that no reasonable jurist could have declined to adopt it. Petitioner contends that *Blakely* was dictated by *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), which held that any fact (other than a prior conviction) that increases the penalty for a crime beyond the "statutory maximum" must be proved to a jury beyond a reasonable doubt. Petitioner is incorrect.

Blakely extended *Apprendi* to facts supporting a sentence above the standard sentencing range in a legislatively prescribed sentencing guidelines system. In so doing, *Blakely* defined "statutory maximum" in a way that was not dictated either by the most straightforward reading of that phrase or by *Apprendi*. The sentence in *Blakely* was below the maximum penalty specified in the Revised Code of Washington for the defendant's offense, even though it was above the standard sentencing range established by the State's statutory guidelines system. Thus, the sentence in *Blakely* was invalid only if the top of the standard range was the "statutory maximum." *Apprendi*, which did not involve a guidelines system, did not decide that question. A reasonable jurist could have concluded—as many did—that, in a guidelines system, the "statutory maximum" is the maximum penalty specified by statute for the offense rather than the top of the guidelines range. Indeed, among the federal and state appeals courts that had considered the issue, *all but one* had held that *Apprendi* did not restrict guidelines systems.

Two other features of the Washington sentencing system also would have permitted reasonable jurists to reach a different result in *Blakely*. First, the legislature did not specify the exclusive set of facts authorizing a sentence above the standard range. Instead, the sentencing judge could impose an exceptional sentence based on a wide range of facts of his own choosing. Second, factual findings alone did not authorize the higher punishment. The judge also had to make a qualitative judgment that those findings provided "substantial and compelling reasons" for an exceptional sentence. The judge thus effectively had discretion to decide both what facts might support a higher sentence and whether the facts actually justified such a sentence. In that respect, a reasonable jurist could analogize the Washington system to traditional, indeterminate sentencing systems, under which judges may find facts by a preponderance of the evidence without violating the Constitution. A reasonable jurist therefore could have con-

cluded that the Washington guidelines system did not violate the Constitution.

B. *Blakely*'s requirement of proof beyond a reasonable doubt for facts supporting a sentence above the standard range in a statutory guidelines system is not a "watershed" rule. A rule is "watershed" only if (1) it alters our understanding of the bedrock procedural elements essential to a fair trial and (2) infringement of the rule so seriously diminishes accuracy that it creates an impermissibly large risk of injustice. *Blakely*'s reasonable doubt rule satisfies neither requirement.

1. *Blakely* did not alter our understanding of the bedrock elements essential to a fair trial. *Blakely* has nowhere near the fundamental and sweeping importance of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), the only rule that this Court has identified as "watershed." *Gideon* announced the core right to counsel for every felony defendant. *Blakely*, in contrast, did not announce the core rule that the elements of a crime must be proved beyond a reasonable doubt; nor did it announce that the reasonable doubt requirement sometimes applies to penalty enhancing facts that are not formal offense elements. *Blakely* merely clarified that the reasonable doubt requirement applies to a certain category of penalty enhancing facts. Moreover, unlike *Gideon*, which pervasively affects the fairness of every aspect of a trial, *Blakely* applies only to those defendants who have already been found guilty of an offense. It applies only in jurisdictions that use a mandatory guidelines system and, even then, only to defendants whose punishment is increased beyond the standard sentencing range by the finding of an aggravating fact. It is therefore no surprise that this Court has concluded that *Blakely* error does not require automatic reversal on direct review because it "does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Washington* v. *Recuenco*, 126 S. Ct. 2546, 2551 (2006) (citation and emphasis omitted).

Another indication that *Blakely* is not as essential to fundamental fairness as *Gideon* is that many facts with as much or more impact on punishment as facts covered by *Blakely* may constitutionally be established by a preponderance of the evidence. Those include facts that increase a sentence within the statutory range, facts that trigger a statutory mandatory minimum, and even facts that support a sentence above the standard range in an *advisory* guidelines system. They also include facts that determine guilt or innocence if the legislature has declared those facts to be defenses rather than elements. These examples demonstrate that the reason for the *Apprendi* and *Blakely* rules is not that no system of justice can tolerate the use of the preponderance standard to find facts with a significant impact on punishment. That happens frequently. And, even without the *Blakely* rule, no defendant faces any punishment at all unless the government has proved the elements of a criminal offense beyond a reasonable doubt. Once that has occurred, it does not offend *bedrock* notions of fairness to find facts that bear on the extent of punishment by a preponderance of the evidence.

2. In addition, infringement of the *Blakely* rule does not so seriously diminish accuracy that it creates an impermissibly large risk of injustice. The preponderance of the evidence standard is a reliable method for finding facts. It is considered sufficiently accurate for many important determinations in criminal cases—including whether a defendant's confession was voluntary, whether he validly waived his Miranda rights, and whether he voluntarily consented to a search. The reliability of the preponderance standard in determining facts that bear on punishment is particularly well established. The preponderance standard is the ordinary standard of proof for finding facts in traditional, indeterminate sentencing systems—even though those facts can have a substantial impact on the defendant's punishment. It is difficult to conceive how it could be constitutional to find those facts by the preponderance standard if using that standard to

find penalty enhancing facts created the serious risk of inaccuracy required by the "watershed" exception.

ARGUMENT

BLAKELY v. *WASHINGTON* DOES NOT APPLY RETROACTIVELY TO CASES ON COLLATERAL REVIEW

In *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt." *Id.* at 490. In *Blakely* v. *Washington*, 542 U.S. 296 (2004), the Court held that the jury trial and reasonable doubt requirements also apply to facts that support a sentence above the standard sentencing range in a legislatively prescribed guidelines system. The questions presented are whether *Blakely* announced a new rule and, if so, whether its requirement of proof beyond a reasonable doubt applies retroactively on collateral review.[3]

Under *Teague* v. *Lane*, 489 U.S. 288, 311 (1989) (plurality opinion), new constitutional rules of criminal procedure generally do not apply retroactively on collateral review. That general bar against retroactivity recognizes that "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal jus-

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[3] *Schriro* v. *Summerlin*, 542 U.S. 348 (2004), already makes clear that, if *Blakely* is a new rule, its *jury trial* requirement is not retroactive on collateral review. *Summerlin* held that *Ring* v. *Arizona*, 536 U.S. 584 (2002), which extended *Apprendi*'s jury trial requirement to the aggravating circumstances that make a defendant eligible for the death penalty, is not retroactive because deprivation of the jury trial right does not seriously diminish the accuracy of a criminal proceeding. *Summerlin*'s reasoning about the jury trial right in *Ring* applies with equal force to the jury trial right in *Blakely*. Therefore, as petitioner acknowledges in his questions presented, if *Blakely* is a new rule, only the retroactivity of its reasonable doubt requirement is at issue. See Pet. Br. i (second question).

tice system." *Id.* at 309. *Teague*'s bar against retroactivity is therefore subject to only a narrow exception for "a small set of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Schriro* v. *Summerlin*, 542 U.S. 348, 352 (2004) (internal quotation marks and citations omitted).[4] Because *Blakely* is a new rule, and its requirement that facts supporting an upward departure from a statutory sentencing guidelines range must be proved beyond a reasonable doubt is not a "watershed rule of criminal procedure," *Blakely* does not apply retroactively on collateral review.[5]

A. *Blakely* Announced A New Rule

Teague's bar on retroactive application of new rules seeks "to ensure that gradual developments in the law over which

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[4] Although the Court has sometimes identified another exception to the *Teague* bar for rules that place conduct or persons beyond the reach of the State's power to punish, the Court has more recently stated that such rules "are more accurately characterized as substantive rules not subject to the bar." *Summerlin*, 542 U.S. at 352 n.4. Petitioner does not contend that *Blakely* established a substantive rule, and for good reason. A rule is substantive only "if it alters the range of conduct or the class of persons that the law punishes." *Id.* at 353. *Blakely* did not prohibit States from punishing any particular conduct or persons. It only held that, if a State conditions punishment above a statutorily mandated guidelines range on the existence of aggravating facts, those facts must be proved to a jury beyond a reasonable doubt. Thus, *Blakely* merely "altered the range of permissible methods for determining * * * essential facts bearing on punishment," and it is a procedural rule. *Ibid.*

[5] Every federal court of appeals and state court of last resort that has addressed the issue has reached that conclusion. See *United States* v. *Hernandez*, 436 F.3d 851, 855 (8th Cir.), cert. denied, 126 S. Ct. 2341 (2006); *Michael* v. *Crosby*, 430 F.3d 1310 (11th Cir. 2005), cert. denied, 126 S. Ct. 2025 (2006); *Schardt* v. *Payne*, 414 F.3d 1025, 1034-1036 (9th Cir. 2005), petition for cert. pending, No. 05-9237 (filed Nov. 10, 2005); *Cirilo-Muñoz* v. *United States*, 404 F.3d 527, 532-533 (1st Cir. 2005); *United States* v. *Price*, 400 F.3d 844, 846-849 (10th Cir. 2005); *People* v. *Johnson*, No. 05SC408, 2006 WL 2589170 (Colo. Sept. 11, 2006) (holding *Blakely* not retroactive on state habeas using *Teague* analysis); *State* v. *Evans*, 114 P.3d 627, 632-633 (Wash. 2005) (same); *State* v. *Houston*, 702 N.W.2d 268, 273 (Minn. 2005) (same).

reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." *Sawyer* v. *Smith*, 497 U.S. 227, 234 (1990). That purpose is reflected in the standard for determining whether a decision announces a new rule: A rule is "new" unless it was so "*dictated*" by precedent in effect when the defendant's conviction became final that it "was apparent to all reasonable jurists." *Beard* v. *Banks*, 542 U.S. 406, 413 (2004) (citation omitted). The question is whether a "reasonable jurist * * * could have reached a conclusion different from the one" this Court ultimately announced. *Lambrix* v. *Singletary*, 520 U.S. 518, 532 (1997). In other words, a rule is new unless a state or lower federal court "would have acted objectively unreasonably" in declining to adopt it. *O'Dell* v. *Netherland*, 521 U.S. 151, 156 (1997).

Petitioner contends (Br. 12-26) that *Blakely* is not a new rule because it was compelled by *Apprendi*, which was decided before his convictions became final. Contrary to that contention, *Blakely* was not compelled by *Apprendi*, much less "*dictated*" by *Apprendi* to the extent that "*no other* interpretation was reasonable." *Lambrix*, 520 U.S. at 538.

1. *Blakely* extended *Apprendi* to facts supporting a sentence above the standard sentencing range in a legislatively prescribed guidelines system. In so doing, *Blakely* defined "statutory maximum" for *Apprendi* purposes in an innovative way that was not dictated by *Apprendi* itself.

In *Apprendi*, the defendant had been convicted of possession of a firearm for an unlawful purpose, an offense for which New Jersey law prescribed a maximum penalty of 10 years in prison. He was sentenced to 12 years in prison, however, because a separate statute increased the authorized punishment if the sentencing judge found, by a preponderance of the evidence, that the defendant acted with a purpose to intimidate an individual because of race. This Court concluded that the enhanced sentence violated the defendant's rights under the Sixth Amendment and the Due Process Clause. The

Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt." 530 U.S. at 490.

In *Blakely*, the defendant pleaded guilty to kidnapping, a felony for which Washington law prescribed a maximum prison term of 10 years. Washington's legislatively enacted sentencing guidelines, however, required a standard sentence of between 49 and 53 months in prison, unless the sentencing judge found aggravating circumstances that justified an exceptional sentence. The sentencing judge found, by a preponderance of the evidence, that the defendant had acted with deliberate cruelty, and the judge concluded that an exceptional sentence of 90 months in prison was therefore justified. This Court held that the enhanced sentence violated the rule enunciated in *Apprendi*, because the top of the standard sentencing range, rather than the ultimate statutory cap of 10 years, qualified as the "statutory maximum" for purposes of the *Apprendi* rule. 542 U.S. at 303-304.

The sentence in *Apprendi* exceeded the 10-year maximum prescribed by New Jersey statute for the defendant's offense. In contrast, the sentence in *Blakely* was below the 10-year maximum specified in the Revised Code of Washington for the defendant's offense, even though it was above the standard sentencing range established by the State's statutory guidelines system. Thus, the sentence in *Blakely* was subject to the *Apprendi* rule only if the top of that standard sentencing range, rather than the ultimate statutory limit, was the "statutory maximum" for purposes of the rule. *Apprendi* had not decided whether the top of a standard sentencing range that is lower than the maximum penalty otherwise prescribed by statute for the offense qualifies as the "statutory maximum." *Apprendi* did not involve a sentencing guidelines system, and the Court therefore had no occasion to consider whether or how its rule would apply in that situation.

Petitioner incorrectly asserts that *Apprendi* defined "statutory maximum" as the maximum sentence a defendant could receive "*if punished according to the facts reflected in the jury verdict alone.*" Pet. Br. 18 (quoting *Apprendi*, 530 U.S. at 483). To be sure, the *Apprendi* opinion included the language quoted by petitioner, and, in *Blakely*, this Court relied in part on that language to support its holding. See 542 U.S. at 303. But the Court in *Apprendi* did not use the quoted language in defining (or even in discussing) the term "statutory maximum." See 530 U.S. at 483, 494. In fact, the Court did not define "statutory maximum" at all. The Court had no occasion to do so because there was no dispute in *Apprendi* that the sentence exceeded the 10-year statutory maximum. "It was not until *Blakely* that [the Court] clarified that 'the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*'" *United States* v. *Price*, 400 F.3d 844, 847 (10th Cir. 2005) (quoting *Blakely*, 542 U.S. at 303)); see *Simpson* v. *United States*, 376 F.3d 679, 681 (7th Cir. 2004) ("*Blakely* * * * alter[ed] courts' understanding of 'statutory maximum.'").

Given the limited guidance in the *Apprendi* opinion on the meaning of "statutory maximum," a state or lower federal court applying *Apprendi* to a guidelines system could reasonably have concluded—as those courts did almost universally conclude (see p. 15, *infra*)—that the "statutory maximum" was the maximum penalty specified by statute for the offense rather than the top of the guidelines range. And, under that interpretation, facts supporting upward departures from the guidelines range would not have had to be proved to a jury beyond a reasonable doubt. Indeed, Justice O'Connor, joined by the other three dissenting Justices in *Apprendi*, suggested just such an interpretation of the *Apprendi* decision. She noted that, "under one reading" of the Court's opinion, "[a] State could * * * remove from the jury (and subject to a standard of proof below 'beyond a reasonable doubt') the as-

sessment of those facts that define narrower ranges of punishment, *within the overall statutory range*, to which the defendant may be sentenced." 530 U.S. at 540 (dissenting opinion). The Court's response was not that her proposed interpretation was foreclosed by *Apprendi*. Instead, the Court argued that use of that kind of sentencing system would be constrained by political considerations and by precedent other than *Apprendi*. See *id.* at 490 n.16 (majority opinion).

The reading of *Apprendi* that Justice O'Connor proposed was supported by the *Apprendi* Court's claim that its decision was consistent with *Walton* v. *Arizona*, 497 U.S. 639 (1990). *Walton* had upheld Arizona's death penalty system, which required, after a jury found a defendant guilty of first-degree murder, that a judge find additional aggravating factors before imposing a death sentence. See 530 U.S. at 541 (dissenting opinion). The *Apprendi* majority asserted that the Arizona system was consistent with *Apprendi* because Arizona's first-degree murder statute specified death as the maximum penalty. See *id.* at 497. But, as Justice O'Connor noted, *id.* at 541 (dissenting opinion)—and the Court later acknowledged when overruling *Walton* in *Ring* v. *Arizona*, 536 U.S. 584, 604 (2002)—other provisions of Arizona law made clear that life imprisonment was the most serious penalty that could be imposed unless the judge found additional facts. The *Apprendi* Court's refusal to overrule *Walton* thus supported a reading of *Apprendi* under which the "statutory maximum" was the highest penalty specified by statute for the offense, even when other provisions of law restricted the circumstances under which that penalty could be imposed.[6]

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[6] In ultimately holding that *Walton* was inconsistent with *Apprendi*, *Ring* provided some clarification of the meaning of "statutory maximum." But *Ring* still did not resolve the meaning of that term in the context of a sentencing guidelines system like Washington's, and *Blakely* was therefore not dictated by *Ring*. In any event, *Ring* had not been decided when petitioner's convictions and sentence became final, so he cannot rely on *Ring* in arguing that *Blakely* is not a new rule. See p. 10, *supra*.

If this Court had adopted the reading of *Apprendi* that Justice O'Connor identified as a possible interpretation, the Court would have not have reached the result it did in *Blakely*. It is therefore clear that reasonable jurists "could have reached a conclusion different from the one" that this Court announced in *Blakely*. *Lambrix*, 520 U.S. at 532.

2. Two other differences between the Washington sentencing guidelines system and the sentencing statutes in *Apprendi* also would have permitted reasonable jurists to reach a different result in *Blakely*.

In *Apprendi*, the increase in the statutory maximum depended on a fact specified by the legislature—that the defendant acted for the purpose of intimidation based on race. 530 U.S. at 468-469. Under the Washington system, in contrast, the legislature did not specify the exclusive set of facts authorizing a sentence above the standard range. Instead, a sentencing judge could impose an exceptional sentence based on a wide range of facts of his own choosing, so long as they provided "substantial and compelling reasons" for the enhanced sentence. Wash. Rev. Code §§ 9.94A.120, 9.94A.390.

The Washington system also differed from the one in *Apprendi* in another significant way. In *Apprendi*, the factual finding was itself sufficient to authorize the enhanced sentence. 530 U.S. at 468-469. Under the Washington system, in contrast, factual findings alone did not authorize the higher punishment. The judge had to make an additional, qualitative judgment that the factual findings provided "substantial and compelling reasons" for an exceptional sentence. Wash. Rev. Code § 9.94A.120(2). The judge was not required to reach that conclusion even if he found an aggravating circumstance specifically identified by the legislature. See U.S. Amicus Br. at 19-20, *Blakely*, *supra* (No. 02-1632) (citing cases).

Because of these features of the Washington system, a sentencing judge effectively had discretion to decide both what facts might support a higher sentence and whether those facts actually justified such a sentence. In that respect, the

Washington system resembled traditional, indeterminate sentencing systems, under which judges may find facts by a preponderance of the evidence without violating the Constitution. See U.S. Amicus Br. at 7-8, 15-22, *Blakely*, *supra* (No. 02-1632). A reasonable jurist therefore could have concluded that the Washington guidelines did not violate *Apprendi*.

3. Not only could reasonable jurists have concluded that *Apprendi* did not dictate the invalidation of sentencing guidelines systems, but the vast majority of state and federal courts reached just that conclusion. See *Blakely*, 542 U.S. at 320 n.1 (dissenting opinion) (citing cases). Before *Blakely*, only one appeals court had applied *Apprendi* to invalidate a guidelines scheme. See *ibid.* In contrast, numerous state appellate courts had held that *Apprendi* did not restrict state sentencing guidelines.[7] And every federal court of appeals had held that *Apprendi* did not apply to sentences under the federal Sentencing Guidelines that were within the maximum for the offense specified by statute. See 542 U.S. at 320 n.1 (dissenting opinion) (citing cases). In light of the virtually unanimous rejection of the *Blakely* rule by the state and lower federal courts, it is difficult to conclude that the rule should have been "apparent to all reasonable jurists." *Banks*, 542 U.S. at 413 (citation omitted).

Moreover, *Blakely* was a close decision that generated four dissenting votes. The existence of those dissents also suggests that "reasonable jurists could have differed as to whether" *Apprendi* compelled *Blakely*. *Banks*, 542 U.S. at 414-415; *O'Dell*, 521 U.S. at 159-160. Noting that the *Blakely*

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[7] See, *e.g.*, *State* v. *Dilts*, 82 P.3d 593, 599 (Or. 2003), vacated, 542 U.S. 934 (2004); *State* v. *Gore*, 21 P.3d 262, 276-277 (Wash. 2001), overrruled by *State* v. *Hughes*, 110 P.3d 192 (Wash. 2005); *State* v. *Shattuck*, No. C6-03-361, 2004 WL 772220, at *6 (Minn. Ct. App. Apr. 13, 2004), rev'd, 704 N.W.2d 131 (Minn. 2005); *State* v. *Brown*, 70 P.3d 454, 461-462 (Ariz. Ct. App. 2003); *People* v. *Allen*, 78 P.3d 751, 755 (Colo. Ct. App. 2001); *McCloud* v. *State*, 803 So. 2d 821, 827 (Fla. Dist. Ct. App. 2001); *State* v. *Huntley*, No. 02CA15, 2002 WL 31769238 (Ohio Ct. App. Dec. 9, 2002).

dissenters criticized *Apprendi* itself, petitioner argues (Br. 20-21) that they must have accepted that *Apprendi* compelled *Blakely*. On the contrary, the dissenters argued that *Apprendi* did not require the result in *Blakely*. Writing for all four dissenters, Justice O'Connor repeatedly criticized the Court's "extension of *Apprendi*" to sentencing guidelines systems. 542 U.S. at 314, 318, 320 n.1. She argued that the Washington guidelines "did not alter the statutory maximum sentence to which [Blakely] was exposed," *id.* at 320, and were "as inoffensive to the holding of *Apprendi* as a regime of guided discretion could possibly be," *id.* at 325. Justice Breyer, joined by Justice O'Connor, also lamented that, "[u]ntil now, [he] would have thought the Court might have limited *Apprendi* so that its underlying principle would not undo sentencing reform efforts." *Id.* at 346.

4. Petitioner observes that this Court said in *Blakely* that it was "apply[ing]" *Apprendi*. Pet. Br. 19 (quoting 542 U.S. at 301). And he contends (Br. 12-17) that the application of a rule announced in a previous decision cannot constitute a new rule. That is incorrect. *Teague*'s bar on retroactivity retains its full force when a "prior decision is applied in a novel setting thereby extending the precedent." *Stringer* v. *Black*, 503 U.S. 222, 228 (1992). That is precisely what occurred in *Blakely*. Applying *Apprendi* in the novel setting of statutory sentencing guidelines, *Blakely* extended *Apprendi* to cover facts supporting a sentence above the standard sentencing range, even when the sentence is below the maximum penalty otherwise identified by statute for the crime of conviction.

The cases that petitioner cites (Br. 13-17) establish only that applying a prior decision to govern a "closely analogous" case does not create a new rule when the result is "*dictated*" by the prior decision. *Penry* v. *Lynaugh*, 492 U.S. 302, 314 (1989) (citation omitted). See *id.* at 319 (concluding that the *Penry* rule was "dictated" by precedent); *Stringer*, 503 U.S. at 229 (concluding that it would not create a new rule to apply *Godfrey* v. *Georgia*, 446 U.S. 420 (1980), to Mississippi's capi-

tal sentencing system because that result followed "*a fortiori*" from *Godfrey*). Those cases do not assist petitioner because the result in *Blakely* did not follow *a fortiori* from *Apprendi*.[8]

Petitioner also points to language in *Blakely* and *United States* v. *Booker*, 543 U.S. 220 (2005), suggesting that the result in *Blakely* was "clear" and reflected "respect for long-standing precedent." Pet. Br. 19-20 (citations omitted). But, as this Court has repeatedly observed, courts "frequently" use language suggesting that their decisions are required by precedent "even when aware of reasonable contrary conclusions reached by other courts." *Butler* v. *McKellar*, 494 U.S. 407, 415 (1990); see *O'Dell*, 521 U.S. at 161 n.2.[9]

B. *Blakely* Did Not Establish A Watershed Procedural Rule

Because *Blakely* established a new rule, its requirement of proof beyond a reasonable doubt for facts supporting an upward departure in a statutory guidelines system applies retroactively only if that requirement is a "watershed rule[] of criminal procedure." *Teague*, 489 U.S. at 311 (plurality opinion). That category "is extremely narrow," *Summerlin*,

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[8] Two of the cases cited by petitioner did not involve *Teague*'s new rule principle but instead involved statutory limits on habeas relief imposed by 28 U.S.C. 2254(d). See *Williams* v. *Taylor*, 529 U.S. 362 (2000); *Miller-El* v. *Dretke*, 545 U.S. 231 (2005). The final case on which petitioner relies, *Yates* v. *Aiken*, 484 U.S. 211 (1988), was decided before *Teague*.

[9] Even if *Blakely* had not announced a new rule, applying *Blakely* to grant relief to petitioner would announce one. The sentence for each of petitioner's offenses fell within the standard sentencing range for that offense. The sentence for each offense therefore did not exceed the "statutory maximum" for that offense as defined in *Blakely*. Petitioner contends that his *overall* sentence nonetheless violates *Blakely* because the trial court ordered the individual sentences to run consecutively based on its finding by a preponderance of the evidence that concurrent sentences would be "clearly too lenient." J.A. 29. Thus, to grant petitioner relief, a court would have to decide that the *Blakely* rule applies to findings that support the imposition of consecutive sentences on multiple offenses. Neither *Blakely* nor any other decision of this Court resolves that issue.

542 U.S. at 352, and "it is unlikely that any of these watershed rules ha[s] yet to emerge." *Tyler* v. *Cain*, 533 U.S. 656, 667 n.7 (2001) (internal quotation marks and citation omitted). *Blakely*'s reasonable doubt requirement is not a "watershed" rule.

To qualify for "watershed" status, a rule must "implicat[e] the fundamental fairness and accuracy of the criminal proceeding." *Saffle* v. *Parks*, 494 U.S. 484, 495 (1990). A rule implicates fundamental fairness if it "'alter[s] our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding." *Tyler*, 533 U.S. at 665 (citation omitted). A rule implicates accuracy if its infringement "so *seriously* diminishe[s] accuracy that there is an impermissibly large risk of punishing conduct the law does not reach." *Summerlin*, 542 U.S. at 355-356 (internal quotation marks and citation omitted). The "watershed" exception does not apply unless both of those standards are satisfied. *Tyler*, 533 U.S. at 665. *Blakely*'s requirement of proof beyond a reasonable doubt satisfies neither standard.

1. Blakely did not announce a bedrock rule essential to a fair trial

a. To satisfy the first part of the test for "watershed" rules, a rule must make a "fundamental shift" in "our understanding of the bedrock procedural elements essential to fundamental fairness." *Banks*, 542 U.S. at 419-420 (internal quotation marks, citation, and emphasis omitted). This Court has identified only one rule that has had that dramatic effect: *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). See *Banks*, 542 U.S. at 417. Before *Gideon*, this Court had held that an indigent defendant charged with a felony offense could, in some cases, receive a fair trial without the option of assistance of appointed counsel. In *Gideon*, the Court repudiated that notion and held that, absent a waiver of counsel, a felony trial conducted without a defense lawyer is inherently unfair. *Gideon* thus altered our understanding of the procedures that are

indispensable to a fair trial by adding the right to appointed counsel to that core set of rules.

Rules that are "less sweeping and fundamental" than *Gideon* do not qualify as "watershed" rules. *Banks*, 542 U.S. at 418 (citation omitted). For example, in *Sawyer*, the Court considered the retroactivity of *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985), which held that the Eighth Amendment bars imposition of a capital sentence when a prosecutor mistakenly informs the jury that responsibility for the death penalty rests elsewhere. Even though the *Caldwell* rule was a "systemic rule enhancing reliability," the Court concluded that it was not a "watershed" rule because it only "added to an existing guarantee of due process protection against fundamental unfairness." *Sawyer*, 497 U.S. at 244. Similarly, in *O'Dell*, the Court rejected "watershed" status for *Simmons* v. *South Carolina*, 512 U.S. 154 (1994), which held that a capital defendant has a due process right to introduce evidence of his parole ineligibility to rebut a prosecutor's future dangerousness argument. The Court explained that, "[u]nlike the sweeping rule of *Gideon*," which established a broad right to counsel in all felony cases, the *Simmons* rule is a "narrow right" that applies only in "a limited class of capital cases." 521 U.S. at 167.

These cases establish that rules that apply or extend bedrock constitutional guarantees are not "watershed" unless they have the same "primacy and centrality" as *Gideon*. *Banks*, 542 U.S. at 420 (citation omitted). Thus, rules lack "watershed" status when they make only an "incremental change" in notions of fundamental fairness, or when they apply "narrowly" to a limited class of cases or defendants. *Id.* at 419-420. *Blakely* is just such a rule.

Blakely, like *Apprendi* before it, added a novel corollary to well established constitutional principles. The basic rule that the government must prove all elements of a criminal offense beyond a reasonable doubt was well settled even before *In re Winship*, 397 U.S. 358 (1970). Indeed, the reason-

able doubt rule "dates at least from our early years as a Nation." *Id.* at 361. This Court had also already made clear, before *Apprendi*, that facts that enhance punishment may sometimes be subject to the reasonable doubt requirement even if they are not formally designated as elements of the offense. See *McMillan* v. *Pennsylvania*, 477 U.S. 79, 88 (1986) (suggesting that proof beyond a reasonable doubt would be required for a sentencing enhancement that amounted to "a tail which wags the dog of the substantive offense"). *Apprendi* determined that facts that enhance punishment beyond the statutory maximum are subject to the well-established reasonable doubt rule. And *Blakely* made an even more incremental change. As discussed above, *Blakely* simply extended the *Apprendi* rule to facts that are necessary to authorize a sentence within the maximum for the offense but above a legislatively prescribed sentencing guidelines range. Line-drawing decisions like *Blakely* may be of substantial importance and have significant practical impact, but they are not the kind of "groundbreaking" decisions, comparable to *Gideon*, that qualify as "watershed" rules. *Caspari* v. *Bohlen*, 510 U.S. 383, 396 (1994).

Nor does the *Blakely* rule have the sweep and importance of a bedrock rule. *Gideon*'s rule against complete denial of counsel applies to every felony trial and affects every stage of the trial and every defendant. The *Blakely* rule, by contrast, does not even apply to the determination whether a defendant is guilty of a crime established by the legislature. Rather, it affects the procedure for determining punishment. Thus, the *Blakely* rule applies only to those defendants who have already been found guilty of an offense. In addition, the rule applies only in jurisdictions that have a guidelines system using mandatory, standard sentencing ranges with circumscribed grounds for departure. And, even in those jurisdictions, the rule applies only to the subclass of defendants whose punishment is increased over the standard sentencing range by the finding of an aggravating fact.

This Court, in holding that *Blakely* error is not structural, has already made clear that *Blakely* does not have comparable sweep and importance to *Gideon*. Because the presence of counsel pervasively affects all aspects of a trial, a complete denial of the right to counsel makes a fair trial impossible. This Court has therefore stated that *Gideon* error is structural and requires automatic reversal when properly raised on direct review. See *Neder* v. *United States*, 527 U.S. 1, 8 (1999). In contrast, the Court has held that *Blakely* error is not structural and does not require automatic reversal. *Washington* v. *Recuenco*, 126 S. Ct. 2546 (2006). In *Recuenco*, the Court concluded that failure to require proof beyond a reasonable doubt of a penalty enhancing fact "does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 2551 (citation and emphasis omitted). That conclusion makes clear that the *Blakely* rule is not the kind of "absolute prerequisite to fundamental fairness" that qualifies for "watershed" status. *Sawyer*, 497 U.S. at 244 (citation omitted).

b. Another indication that *Blakely* is not of bedrock character is that fact-finders may constitutionally use the preponderance of the evidence standard to determine many facts that have as much or more impact on punishment as the facts covered by *Blakely*. For example, facts on which a judge relies to increase a sentence within statutory limits may be determined by a preponderance. *United States* v. *Watts*, 519 U.S. 148, 156 (1997) (per curiam); *Nichols* v. *United States*, 511 U.S. 738, 747-748 (1994). The same is true for facts that trigger a statutory mandatory minimum sentence and for facts that reduce the statutory maximum. *Harris* v. *United States*, 536 U.S. 545, 568-569 (2002); *Apprendi*, 530 U.S. at 491 n.16. Even facts that support a sentence above a guidelines range may be proved by a preponderance if the guidelines are advisory rather than mandatory. See *Booker*, 543 U.S. at 233, 259.

Use of the preponderance standard is not limited to facts that bear only on the extent of punishment. Facts that determine the degree of an offense, and facts that determine guilt or innocence of any offense, may be found under the preponderance standard if the legislature declares those facts to be defenses rather than offense elements. Indeed, the government may even impose the burden of proving defenses on the defendant. See, *e.g.*, *Dixon* v. *United States*, 126 S. Ct. 2437 (2006) (duress); *Martin* v. *Ohio*, 480 U.S. 228 (1987) (self-defense); *Patterson* v. *New York*, 432 U.S. 197 (1977) (extreme emotional disturbance).

These examples demonstrate that the reason for the *Apprendi* and *Blakely* rules is not that it is fundamentally unfair for facts with a significant impact on punishment to be found by a preponderance of the evidence. The reason for the rules is, as this Court explained in *Blakely*, "the need to give intelligible content" to the rights of jury trial and proof beyond a reasonable doubt. 542 U.S. at 305. The Court concluded that, to prevent legislatures from eviscerating those rights, there must be a constitutional line that establishes a category of facts to which those rights always attach. But the need for a line does not mean that a rule is of bedrock character when, like the rule in *Blakely*, it merely clarifies that particular facts fall on one side of the line.

Even without the *Blakely* rule, no defendant is exposed to any punishment at all unless the government has proved the core elements of a criminal offense beyond a reasonable doubt. Once that has occurred, the question whether ancillary findings may be established by a preponderance of the evidence does not implicate that small core set of rules that are indispensable to justice, even if those findings have important consequences for the authorization or extent of punishment.

c. In arguing that *Blakely*'s reasonable doubt rule is a bedrock rule, petitioner relies primarily (Br. 31-32) on a statement in *Winship*, and similar statements in other cases, that "a person accused of a crime . . . would be at * * * a disad-

vantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence that would suffice in a civil case." *Winship*, 397 U.S. at 363 (citation omitted). Petitioner ignores essential differences between *Winship*, which recognized the basic rule that guilt of a crime must be proved beyond a reasonable doubt, and *Blakely*, which extended the reasonable doubt requirement to facts supporting upward departures from sentencing guidelines.

Winship held that a family court violated due process by committing a juvenile to a state institution based on findings by a preponderance of the evidence that he had committed acts that, if done by an adult, would constitute larceny. 397 U.S. at 368. Thus, in a case of *Winship* error, the defendant has been denied the right of proof beyond a reasonable doubt on every element of the offense. The error calls into question whether the defendant is guilty of any crime. In a case of *Blakely* error, in contrast, the defendant has been provided the right of proof beyond a reasonable doubt on the facts necessary to establish that he committed a crime. The error does not call into question whether he is guilty of an offense but affects only the extent of punishment that is legally authorized.

This Court's structural error cases confirm that essential difference between *Winship* and *Blakely* error. The failure to require proof beyond a reasonable doubt for an entire offense "vitiates *all* the jury's findings" and pervasively affects the trial in unmeasurable ways. *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993). *Winship* error is therefore subject to automatic reversal if properly raised on direct review. See *id.* at 281-282. In contrast, the failure to require proof beyond a reasonable doubt for a penalty enhancing fact, or even for a single element of a criminal offense, "d[oes] not 'vitiat[e] *all* the jury's findings'" and does not have the same pervasive effect on the trial. *Neder*, 527 U.S. at 11 (quoting *Sullivan*, 508 U.S. at 281); see *Recuenco*, 126 S. Ct. at 2551-2553. As a

result, *Blakely* error does not *necessarily* render a criminal trial fundamentally unfair. *Id.* at 2551.

d. Petitioner also argues (Br. 33-36) that *Blakely* satisfies the bedrock component of the "watershed" test because the right to a jury trial is essential to fundamental fairness. That argument overlooks that the question before this Court is not whether *Blakely*'s *jury trial* right is a "watershed" rule but whether its *reasonable doubt* requirement has that status. See note 3, *supra*. *Summerlin* already establishes that the jury trial right guaranteed by the *Apprendi* line of cases is not a "watershed" rule. See 542 U.S. at 355-358. Contrary to petitioner's assertion (Br. 33), *Summerlin*'s focus on the jury trial right's failure to satisfy the accuracy component of the "watershed" test is of no moment. *Summerlin* held that the jury trial right is not a "watershed" rule and does not apply retroactively. As a result, if *Blakely* announced a new rule, the only right protected by that decision that could apply retroactively is the right of proof beyond a reasonable doubt.

In any event, petitioner is not correct that *Blakely*'s jury trial right is a bedrock requirement indispensable to fundamental fairness. To be sure, the jury trial right is "fundamental to the American scheme of justice." *Duncan* v. *Louisiana*, 391 U.S. 145, 149 (1968). But that does not mean that it implicates fundamental *fairness*. As the Court explained in *Blakely*, the jury trial right is designed not to ensure fairness but to ensure "the people's ultimate control * * * in the judiciary," just as the right of suffrage ensures popular control of the legislative and executive branches. 542 U.S. at 306. Indeed, the Court suggested that fairness might arguably "be better served by leaving justice entirely in the hands of professionals" than by trial by jury. *Id.* at 313. See also *Ring*, 536 U.S. at 607; *DeStefano* v. *Woods*, 392 U.S. 631, 633-634 (1968) (per curiam).

2. *Violation of the* Blakely *rule does not seriously diminish accuracy*

The fact that *Blakely*'s reasonable doubt rule is not a bedrock element of fairness is itself sufficient to establish that the rule is not a "watershed" rule. But the rule also does not satisfy the second requirement for "watershed" status: infringement of the rule does not "so *seriously* diminish[] accuracy that there is an impermissibly large risk of punishing conduct the law does not reach." *Summerlin*, 542 U.S. at 355-356 (internal quotation marks and citation omitted). To meet that requirement, it is not enough that infringement of the rule may have some affect on the accuracy of the criminal proceeding. *Id.* at 356. The diminution in accuracy must be so substantial that it creates an "impermissibly large risk of injustice." *Ibid.* (internal quotation marks omitted). *Blakely*'s reasonable doubt rule does not satisfy that test.

a. The preponderance of the evidence standard is deemed sufficiently reliable for numerous determinations in criminal cases and has long been used in fixing the extent of punishment. Petitioner's argument that there is an impermissibly large risk of inaccuracy when the preponderance standard is used to find facts supporting upward departures from guidelines ranges is premised on a misunderstanding of what the standard requires. Invoking *Winship*, petitioner asserts that "the preponderance standard 'calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted.'" Pet. Br. 29 (quoting *Winship*, 397 U.S. at 368). In fact, *Winship* does not endorse that description of the preponderance standard. On the contrary, *Winship* rejects that description as a "*misinterpretation*." 397 U.S. at 367-368 (emphasis added and citation omitted).

The preponderance standard imposes a significantly higher burden of proof than petitioner describes. The prepon-

derance standard requires that the fact-finder be convinced that the existence of the fact at issue is more likely than not. See, *e.g.*, *In re Personal Restraint of Woods*, 114 P.3d 607, 615 (Wash. 2005); *State* v. *Shepherd*, 41 P.3d 1235, 1238 (Wash. Ct. App. 2002). Application of the preponderance standard, properly understood, to facts that enhance a defendant's punishment is not so unreliable that it creates an impermissibly large risk of injustice.

A wide variety of findings that have a profound effect on the outcome of a criminal proceeding may reliably be made by a preponderance of the evidence. The preponderance standard is used to determine the voluntariness of a defendant's confession, the validity of his waiver of his *Miranda* rights, and the voluntariness of his consent to search. *Lego* v. *Twomey*, 404 U.S. 477, 489 (1972); *Colorado* v. *Connelly*, 479 U.S. 157, 168 (1986); *United States* v. *Matlock*, 415 U.S. 164, 177 (1974). The preponderance standard is used to decide whether the discovery of incriminating evidence was inevitable, so that the evidence may be used against the defendant even if it was the product of a constitutional violation. *Nix* v. *Williams*, 467 U.S. 431, 444 & n.5 (1984). And the preponderance standard is used to resolve preliminary factual questions about the admissibility of evidence under the Federal Rules. *Bourjaily* v. *United States*, 483 U.S. 171, 175-176 (1987). This Court has repeatedly stated that there is "nothing to suggest" that those determinations "have been unreliable or otherwise wanting in quality because not based on some higher standard." *Lego*, 404 U.S. at 488; *Connelly*, 479 U.S. at 168.

The reliability of the preponderance standard in determining facts that bear on the extent of punishment is particularly well established. As described above, in traditional, indeterminate sentencing regimes, judges routinely use the preponderance standard to find the facts on which they rely to increase a defendant's punishment within statutory limits. See p. 21, *supra*. Even in determinate sentencing regimes, it is constitutionally permissible to find facts under the preponder-

ance standard in a wide range of circumstances. See, *e.g.*, *Harris*, 536 U.S. at 568-569 (mandatory minimums); *Booker*, 543 U.S. at 233, 259 (facts in advisory guidelines systems).

Those facts can have a "substantial impact" on the defendant's punishment. *Harris*, 536 U.S. at 549 (plurality opinion). For example, they may determine whether someone who uses a firearm in furtherance of a drug trafficking crime is imprisoned for five years, 30 years, or life. See 18 U.S.C. 924(c)(1)(B)(ii), 924(c)(1)(C)(ii). Similarly, they may determine whether a murderer spends only a few years or his entire life in prison. See 18 U.S.C. 1111 (2000 & Supp. IV 2004). It is difficult to conceive how it could be constitutional to find those facts by the preponderance standard if using that standard to find penalty enhancing facts created the serious risk of inaccuracy required by the "watershed" exception.

b. Facts bearing on punishment may be found with sufficient reliability using the preponderance standard because determination of those facts occurs only after a defendant has been found guilty of a criminal offense beyond a reasonable doubt. "Once the reasonable doubt standard has been applied to obtain a valid conviction, 'the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him.'" *McMillan*, 477 U.S. at 92 n.8 (citation omitted). Under those circumstances, the preponderance standard may be used to find additional facts that bear on the extent of the defendant's punishment without creating a risk of inaccuracy to the degree required for retroactivity.

That is particularly true because other constitutional protections promote the reliability of fact-finding at sentencing. For example, the defendant has the right to notice of the facts on which the judge may rely to increase his punishment and an opportunity to contest those facts. See *Oyler* v. *Boles*, 368 U.S. 448 (1962). In addition, the defendant has the right to the assistance of counsel. See *Mempa* v. *Rhay*, 389 U.S. 128 (1967). Those protections mitigate any risk of inaccuracy created by use of the preponderance standard.

The essential reliability of the preponderance standard for determining facts that enhance punishment is borne out by experience. On direct review, the federal courts of appeals have frequently found *Apprendi*-type errors harmless because the quantum of proof made no difference to the accuracy of the factual findings.[10] Applying plain error review, those courts have also frequently found that *Apprendi*-type errors neither impaired substantial rights nor seriously affected the fairness, integrity, or public reputation of judicial proceedings, because the evidence was essentially uncontroverted or so overwhelming that it did not affect the reliability of the factual findings.[11]

c. In arguing that violations of *Blakely*'s reasonable doubt rule impermissibly diminish accuracy, petitioner invokes (Br. 28-29) two cases that predate *Teague—Ivan V.* v. *City of New*

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[10] See, *e.g.*, *United States* v. *Soto-Beniquez*, 356 F.3d 1, 46 (1st Cir. 2003), cert. denied, 541 U.S. 1074 (2004); *United States* v. *Lawson*, 16 Fed. Appx. 205, 208 (4th Cir. 2001), cert. denied, 534 U.S. 1168 (2002); *United States* v. *Baptiste*, 309 F.3d 274, 278 (5th Cir. 2002), cert. denied, 538 U.S. 947 (2003); *United States* v. *Copeland*, 321 F.3d 582, 605-606 (6th Cir. 2003); *United States* v. *Anderson*, 236 F.3d 427, 430 (8th Cir.), cert. denied, 534 U.S. 956 (2001); *United States* v. *Smith*, 282 F.3d 758, 771-772 (9th Cir. 2002); *United States* v. *Anderson*, 289 F.3d 1321, 1328 (11th Cir. 2002), cert. denied, 537 U.S. 1195 (2003).

[11] See, *e.g.*, *United States* v. *Parrilla-Sanes*, 6 Fed. Appx. 38, 40 (1st Cir.), cert. denied, 534 U.S. 937 (2001); *United States* v. *Henry*, 325 F.3d 93, 102-103 (2d Cir.), cert. denied, 540 U.S. 907 (2003); *United States* v. *Campbell*, 295 F.3d 398, 404-405 (3d Cir. 2002), cert. denied, 537 U.S. 1239 (2003); *United States* v. *Carrington*, 301 F.3d 204, 212-213 (4th Cir. 2002); *United States* v. *Longoria*, 298 F.3d 367, 374 (5th Cir.), cert. denied, 537 U.S. 1038 (2002); *United States* v. *Lopez*, 309 F.3d 966, 970-971 (6th Cir. 2002), cert. denied, 537 U.S. 1178 (2003); *United States* v. *Mansoori*, 304 F.3d 635, 658 (7th Cir. 2002), cert. denied, 538 U.S. 967 (2003); *United States* v. *Wheat*, 278 F.3d 722, 741 (8th Cir. 2001), cert. denied, 537 U.S. 850 (2002); *United States* v. *Pimentel-Tafolla*, 60 Fed. Appx. 656, 670 (9th Cir.), cert. denied, 538 U.S. 1036 (2003); *United States* v. *Perry*, 25 Fed. Appx. 713, 719 (10th Cir. 2001); *United States* v. *Candelario*, 240 F.3d 1300, 1311-1312 (11th Cir.), cert. denied, 533 U.S. 922 (2001); *United States* v. *Webb*, 255 F.3d 890, 901-902 (D.C. Cir. 2001).

York, 407 U.S. 203 (1972) (per curiam), and *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977). Those cases do not establish that *Blakely*'s reasonable doubt rule satisfies the accuracy component of the test for "watershed" rules.

Ivan V. held that *Winship* applied retroactively to cases on direct review, and *Hankerson* held the same for *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975). In *Mullaney*, this Court addressed a State rule that required a defendant charged with murder to prove that he acted in the heat of passion on sudden provocation in order to reduce the homicide to manslaughter. The Court held that a State that defines a particular fact as an element of an offense may not dispense with the burden of proving that element to the jury beyond a reasonable doubt by relying on a presumption arising from other facts. See *Patterson*, 432 U.S. at 215.

Ivan V. and *Hankerson* offer scant guidance here because they were decided before *Teague* and concerned retroactivity on direct, rather than collateral, review. Petitioner nonetheless asserts that they "control" this case because (according to him) they applied "the very same accuracy-diminishing inquiry that *Teague* later adopted." Pet. Br. 28-29. That is incorrect. Those cases applied a retroactivity standard that *Teague* repudiated as insufficiently responsive to the serious costs to the criminal justice system from disturbing the finality of convictions obtained in accordance with then-existing law. Under the *Teague* standard, an impact on accuracy is insufficient to justify applying a new rule retroactively unless the rule also alters our understanding of the bedrock elements essential to fair criminal proceedings. See *Sawyer*, 497 U.S. at 242; *Banks*, 542 U.S. at 419-420. In addition, the accuracy component of the *Teague* inquiry is more demanding than the accuracy inquiry under prior precedent. See *Teague*, 489 U.S. at 313 (plurality opinion). Under *Teague*, the Court asks whether the diminishment in accuracy from infringing the rule is "so serious[]" that it creates an "impermissibly large risk of injustice." *Summerlin*, 542 U.S. at 356 (internal

quotation marks omitted). The Court did not conduct that inquiry in *Ivan V.* or *Hankerson*.

Moreover, *Ivan V.* and *Hankerson* involved more fundamental errors that pose a more serious risk of inaccuracy than *Blakely* error. *Ivan V.* involved the use of the preponderance standard for determining *all* the elements of an offense, rather than the use of that standard to determine the extent of punishment, as in cases of *Blakely* error. And *Hankerson* did not involve the substitution of the preponderance standard for the reasonable doubt standard. Rather, it involved the allocation to the defense of the burden of disproving an offense element, so that the State could prevail on that element on a finding supported by even less than a preponderance of the evidence. The Court's views on whether the errors in *Ivan V.* and *Hankerson* posed a risk of inaccuracy therefore do not suggest that *Blakely* error "so seriously diminishe[s] accuracy as to produce an impermissibly large risk of injustice." *Summerlin*, 542 U.S. at 356 (internal quotation marks omitted).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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